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University Adjudications of Sexual Assaults: A Lesson To Be Learned From Collective Bargaining Agreements

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Once upon a time, Title IX of the federal Higher Education Act was read only as requiring equal opportunity for female athletes in universities' varsity sports programs. A 2011 "Dear Colleague" letter from the U.S. Department of Education (DOE) announced a radically expanded reading of the law to include sexual misconduct. A few years later then-President Obama called for a crusade to stamp out sexual assaults on college campuses.

One progeny of this call to arms has been a proliferation of litigation against the universities trying to rise to Obama's challenge. As reported in 2017 in *The Washington Post*, "Since 2011, more than 150 lawsuits have been filed against colleges and universities involving claims of due-process violations during the course of Title IX investigations and proceedings related to sex-assault allegations…. In the two decades before that year,… only 15 such lawsuits were filed against universities."[2]

In an effort to staunch this litigious tide, the DOE recently withdrew its 2011 "Dear Colleague" letter and released proposed regulations, which, among other things, would free schools to raise the standard of proof in sexual-assault adjudications from a mere "preponderance of the evidence" (often called "more likely than not") to "clear weight of the evidence." Other procedural safeguards for the accused, who are the usual sources of the lawsuits, include new rights of discovery and cross examination. Additionally, universities and their employees, who enforce sexual harassment and sexual assault standards, would enjoy qualified immunity from subsequent suits.

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[2] T. Reese Shapiro, "Expelled for sex assault, young men are filing more lawsuits to clear their names," Washington Post, April 28, 2017, accessed at https://www.washingtonpost.com/local/education/expelled-for-sex-assault-young-men-are-filing-more-lawsuits-to-clear-their-names/2017/04/27/c2cfb1d2-0d89-11e7-9b0d-d27c98455440_story.html?utm_term=.6ca74dbccee6

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As the DOE proceeds with the public-comment period required by the Administrative Procedure Act, its policy wonks should be prepared to think outside the box in which higher education has confined itself in its well-intentioned efforts to meet the Office of Civil Right's demands and "do the right thing."

In my view, the fundamental error to which colleges and universities have fallen prey is trying to adapt their existing codes of conduct to adjudication of sexual assault allegations. Procedures and standards of proof, which are perfectly adequate and appropriate to typical student-misconduct cases—alcohol violations, for example—fall far short of the mark when applied to allegations amounting to felonies and frequently leading to expulsion. Little wonder that a young man found "more likely than not" responsible for instigating non-consensual sex, concludes that "the civil courts offer a last chance for justice…," per the *Post* article. And, while the proposed regulations will go a long way toward rectifying these procedural inadequacies, I do not believe they go far enough.

Let me suggest that tightening up the procedures and raising the standard of proof are only the first steps in correcting a fundamentally flawed adjudication process.

Let me further propose that, rather than looking to institutions' student-conduct codes as the starting point for a sexual-misconduct adjudication process, and trying to beef those up, we look to the well-established and robust realm of binding arbitration. Arbitration historically has been, and today remains, the primary method for adjudication of disciplinary matters under collective bargaining agreements. During the past several decades, the U.S. Supreme Court has not merely anointed, but in fact has encouraged, arbitration clauses in individual employment agreements.[3] And binding-arbitration clauses now proliferate across many other fields of law, from commerce to divorce to healthcare.

Why? Because binding arbitration is widely viewed as a sort of "Goldilocks" of dispute resolution. On one hand, arbitration offers an expeditious alternative to years of litigation. On the other it incorporates sufficient due process—direct and cross examination of witnesses, full disclosure of relevant documents and other exhibits, assistance of counsel (all the things the DOE's proposed regulations aim to accomplish and more)—to satisfy almost all jurists and attorneys. Further, whether explicit or not, "clear weight" was the evidentiary standard in the arbitrations involving discharges to which I have been privy.

Last, but hardly least, binding arbitration is, well, binding. As a labor lawyer of some 10 years' experience with a major Philadelphia law firm prior to entering higher education

[3] See *Epic Systems Corporation v. Lewis,* 138 S.Ct. 1612 (May 21, 2018).

administration, I never knew of a labor arbitration that was overturned by a court. Few arbitration awards were ever even challenged.

Replacing the current adjudication procedures for campus sexual assaults with binding arbitration would be a win-win. The parties—accuser and accused—would be afforded genuine due process, and within a framework that affords them a level of privacy that's quite impossible in a civil suit. The university for its part would shoulder affordable fees in stark contrast to the hundreds of thousands of dollars that even the successful defense of a civil suit inevitably entails. A qualified and experienced neutral renders the award, which, absent evidence of significant bias or improprieties on the arbiter's part, is unassailable by way of a subsequent civil action.

Unionized workers and many non-union employees, if accused of sexual misconduct and facing discharge, enjoy the right under their contracts to demand arbitration of the accusations. Why not afford college students, caught up in similar circumstances, the same opportunity?

And, finally, universities and their employees, who adjudicate sexual misconduct cases, should enjoy the same *absolute* immunity from suit afforded the pubic courts and judges whose places they are taking. Judges, generally, are immune from suit for decisions rendered within the ambits of their jurisdictions. Since universities are charged to serve as surrogates for the criminal justice system, deemed by the federal government to be inadequate to the task, fairness demands that they enjoy a shield as broad and solid as that afforded the courts and judges.